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THE TYRANNY OF THE TAXING POWER

IT has been frequently stated that our constitutions and our courts were made and organized for the protection of capital and of the vested interests. If this be the case, they are manifestly inadequate for their purpose, and the danger of the future is not that capital will be too much protected but that the reckless extravagance of today will continue and be increased, and that our representatives in our city councils, our state legislatures, and our national congress, who depend for their elections upon the votes of the majority who have accumulated little or nothing, will more and more yield to the demand for appropriations and expenditures which can only be financed and provided for by an excessive taxation of those who have. Seldom is a state or municipal bond issue voted down, for not only are those who are to be directly benefited active in its support, but the enterprise usually means jobs and work for the many, and the many have no property to be taxed and do not pay. Already the municipalities, by confiscating the value of city lots by taxes and special assessments, have reduced the fee owners to but little more than tenants.¹ Not only is this the fact, but there everywhere seems to be a widespread propaganda of socialism and of communism which looks upon the power of taxation as a means to equalize fortunes and to control social policies, and in some of the socialistic states of the west even as a means to drive out of existence privately owned industries and establishments which dare to compete with those which are publicly owned.²

There is, in short, a real danger that we will destroy the goose that lays the golden egg, and for the sake of present enjoyment, and on account of the jealousy which those who have not always entertain for those who have, and the desire to aid in the promo-

¹ It is doubtful if the constitutionality of these taxes or assessments would ever have been recognized if the municipalities of the country generally by wild extravagance, and often corruption, in the days of their youth, had not squandered all their available resources and reached their debt limits so that necessary improvements could not be financed in any other way. *McKenzie v. Mandan*, 27 N. Dak. 546; *Robertson Lumber Co. v. Grand Forks*, 27 N. Dak. 556.

² In North Dakota privately owned elevators and mills are assessed at 100 per cent of their value, other city property at 60 per cent and publicly owned industries not at all. If a man who has established a manufacturing industry which is worth \$100,000 wills it to his son, and the son must pay a tax of \$50,000 on the inheritance, who will doubt that this means the ruin of the industry? And yet under the decisions of the Supreme Court of the United States this can be done. And if the Socialists gain strength, or the public extravagance which induces our legislators to vote away our resources *ad libitum* continues, it will be a matter of frequent occurrence.

tion of state and municipally owned enterprises, the majority of which must necessarily prove failures and be but short-lived, we will tax out of existence our permanent and organized industries and industrial endeavor, destroy all incentive to the accumulation of capital and to national thrift, and render ourselves totally unable to compete in the markets of the world.³ If indeed constitutional revision or amendment is necessary today, it is so not because the right to property has in the past been held to be too sacred, but because it has not been held sacred enough; not because the courts have protected and are liable to protect property too much, but because they have not protected and are liable not to protect it enough. It will be necessary because the socialist has come to learn that by the means of taxation capital and "the reign of Capitalism" can be totally destroyed, and that by this means the dead level of private ownership or the government ownership and control for which he strives may be brought about.

So far the means for this destruction have been special assessments for so-called local improvements, the extension of the commerce clause of the Federal Constitution, and the use of the power of taxation to destroy the freedom of commerce and to control the domestic policies of the several states;⁴ the seemingly harmless but far-reaching amendments to the constitutions of the several states which allow property to be classified for the purposes of taxation; the tendency of the Federal Courts to uphold classification of any nature or kind even in the absence of any such amendment;⁵ income,

³ It is quite clear that if we would compete with other nations we must have industrial organizations which are as strong financially as are theirs. There can be little doubt that the enormous national indebtedness, which was occasioned by the French wars and the new opportunity to engage in world trade that both the industrial revolution and the destruction of the fleets of their enemies occasioned, had much to do with the repeal of the British anti-combination statutes of the middle centuries.

⁴ As for instance, the oleomargarine tax and the tax on the products of child labor. See 3 MINN. L. REV. 89.

⁵ In the case of *Southwestern Oil Company v. Texas*, 30 Sup. Ct. Rep. 496, Mr. Justice Harlan says, "In our judgment, the objection that, within the true meaning of the 14th Amendment, the statute of Texas has the effect to deny to the Oil Company the equal protection of the laws, does not rest upon any solid basis. The statute makes no distinction among such wholesale dealers as handle the particular articles specified in § 9. The state had the right to classify such dealers separately from those who sold, by wholesale, other articles than those mentioned in that section. The statute puts the constituents of each of those separate classes on the same plan of equality. It is not arbitrary legislation, except in the sense that all legislation is arbitrary. If it be within the power of the legislature to enact the statute, then arbitrariness cannot be predicated of it in a court of law. And it cannot be held to be beyond legislative power simply because of its classification of occupations. What were the special reasons or motives inducing the state to adopt the classification of which the Oil Company complains, we do not certainly know. Nor is it important that we should certainly know. It may be

excise and occupation taxes; and the concession of the power to impose taxes upon inheritances, coupled with the most pernicious of all doctrines that "the power to tax" may be legitimately used as a "power to destroy."⁶

Not long since a North Dakota farmer, when asked who would pay for the cost and the losses of the comprehensive scheme of state socialism about to be inaugurated, pointing to the banks and stores and other privately owned industrial enterprises on the street on which he stood, answered, "These people will." The threat was not without legal support and only needed legislative sanction to put it into operation, for in North Dakota property can be classified even for the purposes of general taxation; and there is nothing to prevent the inauguration of a policy such as that pursued in the Transvaal Republic prior to the Boer War by the government of Oom Paul, which, leaving the farms and farm properties practically untaxed, placed all of the burden of the support of the state on the shoulders of the mine owners, the manufacturers, and the business

that the main purpose of the state was to encourage retail dealing in the particular articles mentioned in § 9. If the statute had its origin in such a view, we do not perceive that this court can deny the power of the state to proceed on that ground."

"The decisions of this court from the beginning lend no support whatever to the assumption that the judiciary may restrain the exercise of lawful power on the assumption that a wrongful purpose or motive has caused the power to be exerted. As we have previously said; from the beginning no case can be found announcing such a doctrine, and, on the contrary, the doctrine of a number of cases is inconsistent with its existence. As quite recently pointed out by this court in *Knowlton v. Moore*, 178 U. S. 41, 60, 44 L. ed. 969, 977, 20 Sup. Ct. Rep. 747, the often quoted statement of Chief Justice Marshall in *McCulloch v. Maryland* (4 Wheat. 316, 4 L. ed. 579), that the power to tax is the power to destroy, affords no support whatever to the proposition that where there is a lawful power to impose a tax its imposition may be treated as without the power because of the destructive effect of the exertion of the authority. And this view was clearly pointed out by Mr. Chief Justice Marshall in the passage from *Gibbons v. Ogden*, 9 Wheat. 1, 6 L. ed. 23, which was repeated in the passage from the opinion in *Champion v. Ames*, previously cited." *McCray v. United States*, 24 Sup. Ct. Rep. 776.

⁶ Too many have acted and written on the assumption that when in the case of *McCulloch v. Maryland*, 4 Wheat. 316, Chief Justice Marshall stated that the power to tax involved the power to destroy, he unhesitatingly gave his sanction to the use of the power for that purpose. The truth is that the phrase has been used by the writers, at any rate by those who were prior in time to that decision, as a warning and as a protest both against unreasonable taxation and the extension of the taxing prerogative of the Federal Congress, rather than in terms of approbation and approval. The power to tax certainly may be so used as to destroy, but if it is so used it is wrongfully used except in those cases where the raising of the necessary revenues imperatively demands such destruction. The right of taxation with its enormous privileges and freedom from judicial criticism so that unequal and double and treble charges are often tolerated was only conceded on account of the public necessity for raising money and was never intended to be used as a means for enforcing or inaugurating police regulations for accomplishing and destroying that which could not be accomplished or destroyed by direct means. See "Interstate Commerce and Child Labor," 3 MINN. L. REV. 89.

and professional classes.⁷ All, in short, that the North Dakota enthusiast needs to do in order to eliminate the middleman of whom he stands so much in fear and the owner of the private industry which may compete with that which is publicly owned is to tax him out of existence, for even the Supreme Court of the United States seems to have held that no complaint of class legislation can be made so long as all within the particular class of mine owners, or manufacturers, or business men, or lawyers are treated alike; nor can the motives of the legislature be inquired into; nor can any complaint be made that the tax is confiscatory, for is not "the power to tax the power to destroy"? "Nothing," says Judge Cooley,⁸ "but express constitutional limitation upon legislative authority can exclude anything to which the authority extends from the grasp of the taxing power, if the legislature in its discretion shall at any time select it for revenue purposes. And not only is the power unlimited in its reach as to its subjects but in its very nature it acknowledges no limits, and may be carried to any extent which the government may find expedient. It may, therefore, be employed again and again upon the same subjects, even to the extent of exhaustion and destruction, and may thus become in its exercise a power to destroy." "It is insisted, however," said the court, in *Veazie Bank v. Fenno*,⁹ "that the tax in the case before us is excessive, and so excessive as to indicate a purpose on the part of Congress to destroy the franchise of the bank, and is therefore beyond the constitutional power of Congress."

"The first answer to this is that the judicial cannot prescribe to the legislative departments of the government limitations upon the exercise of its acknowledged powers. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts but to the people by whom its members are elected. So if a particular tax bears heavily upon a corporation, or a class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution."¹⁰

⁷ See "An Unwritten Chapter in the History of South Africa." *QUARTERLY JOURNAL OF THE UNIVERSITY OF NORTH DAKOTA*, Vol. I, p. 125.

⁸ COOLEY ON TAXATION (2d Ed.) 5.

⁹ 8 Wall. 533, 556. See also *McCulloch v. Maryland*, 4 Wheat. 431, *Citizens Savings Loan Ass. Bank v. Topeka*, 20 Wall. 655 (U.S.); *McCray v. United States*, 24 Sup. Ct. Rep. 776.

¹⁰ Perhaps, indeed, no more dangerous utterance, when unqualified, was ever made. We will admit the historical truth of the fact that in the past governments and monarchs have assumed that "the sovereign right to lay and collect taxes grows out of the paramount necessities of government; an urgent necessity which admits no property in the

If this is the law, and to judge by the authorities cited and the decisions in the cases of the *State Bank Taxes*, the *Oleomargarine Taxes*, and the senatorial argument on the *Child Labor Taxes*, it appears to be the law, we can do indirectly and by means of taxation that which we could not do and would not perhaps dare to do directly. But what does the socialist or the social enthusiast care as to the means if only he can accomplish his ends? Under the Fifth and the Fourteenth Amendments to the Federal Constitution we cannot legislate legitimate private businesses out of existence, but under the taxing power, both state and Federal, we appear to be able to do so.

And the same thing appears to be true in the case of devises, bequests and inheritances. There was a time when we thought that even though there might not be a natural and inalienable right to inherit, there was a property right in the testator to leave by will, so that an industry which he had built up by years of toil and foresight could be placed in safe hands after his death and made pro-

citizen whilst it remains unsatisfied." (Nisbet, J., in *Perham v. Justices of Decatur*, 9 Geo. 341, 352). We are, however, cognizant of the fact that an abuse of the taxing power has lain behind almost every revolution of ancient and of modern times. So, too, there is a wide distinction between the power of taxation which rests in or is conceded to, a parliament such as that of England which is the parliament of a single and unfederated nation, and is a legislative body and constitutional convention in one, and the legislatures of our several states which possess supreme and original sovereignty, except where that sovereignty is limited or restrained by the state or national constitutions, and the power of taxation which is possessed by a government of delegated powers such as that of the United States. It is true that in justifying such taxes the late Judge Cooley says, "The power of taxation is an incident of sovereignty, and is co-extensive with that of which it is an incident. All subjects, therefore, over which the sovereign power of the state extends, are, in its discretion, legitimate subjects of taxation; and this may be carried to any extent to which the government may choose to carry it. In its very nature it acknowledges no limits, and the only security against abuse must be found in the responsibility of the legislature which imposes the tax to the constituency who are to pay it." But this reasoning cannot apply where sections of a vast federated nation of diverse climatic and geographical interests may combine against the products and industries of other states and of other localities. There is only a legislative redress where the constituents of those legislators are in a measure similarly and equally affected. The modern occupation tax, indeed, can, under such a construction of the constitution, be used to absolutely nullify the provision of the constitution which denies to Congress the right to deprive any person of life, liberty, or property without due process of law, or to deny to any person the equal protection of the law. Even Mr. Justice Cooley goes on further to state that "the judiciary can afford no redress against oppressive taxation so long as the legislature in imposing it shall keep within the limits of legislative authority." It would seem too plain for argument that the power to tax was delegated to the federal government for the purpose of raising revenues, and raising revenue alone, and that states who were so jealous and fearful of a centralized government as to insist on an agreement for the insertion of the first ten amendments before they would themselves ratify the constitution, would hardly have conceded that the taxing power should be unlimited and could be so used to nullify the very amendments upon which they relied.

ductive for the coming generations.¹¹ Such, however, does not seem to be the case, or, if it is, the right can be taxed out of existence, and again the socialist is given a free hand.

In the case of *Magoun v. Illinois Trust and Savings Bank*¹² the Supreme Court of the United States, in an opinion written by Mr. Justice McKenna in relation to a tax upon a devise, sustained the validity of a state progressive income tax which discriminated between devises to and inheritances of lineal and collateral descendants, and between such persons and strangers to the blood; this both as to the minimum legacy or inheritance on which the tax should be levied and the percentage such inheritance or legacy should pay, the tax being progressive both as between the classes and within the several classes themselves. The only clause of the Fourteenth Amendment which was specifically invoked was that which prohibited a state from denying to any citizen the equal protection of the laws, and the only question the court directly passed upon was that of classification. It stated that the amendment "only requires the same means and methods to be applied impartially to all the constituents of a class so that the law shall operate equally and uniformly upon all persons in similar circumstances." It seems to have conceded that if the tax had been a general tax upon property no such increase of taxation would have been sustained, but in the instant case sustained it on the ground that "The tax is not on money; it is on the right to inherit, and hence a condition of inheritance, and it may be graded according to the value of that inheritance. The condition is not arbitrary because it is determined by that value; it is not unequal in operation because it does not levy the same percentage on every dollar; does not fail to treat 'all alike under like circumstances and conditions, both in the privilege conferred and the liabilities imposed.'"

Although the point was avoided, or rather sought to be avoided, there was necessarily involved in the determination of this case the fundamental question as to whether the right to devise by will or to inherit—take by succession—is fundamental, natural, and inalienable. The tax was sustained upon the theory that such taking is a mere privilege. This, by Mr. Justice Brewer in his dissenting

¹¹ "The right to transmit property by descent to one's own offspring is dictated by the voice of nature. The universality of the sense of a rule of obligation is pretty good evidence that it has its foundation in natural law." 2 KENT, COMM. 326.

"In America, the right to acquire to hold, to enjoy to alien, to devise and to transmit property by inheritance to our descendants in regular order and succession is enjoyed to the fullness and perfection of absolute right." 2 KENT, COMM. 327. See also *Dibrell v. Lanier*, (Tenn.) 12 L. R. A. 70.

¹² 170 U. S. 283.

opinion, is clearly intimated when, in speaking of the majority opinion, he said: "The argument is that because the state may regulate inheritances and the extent of testamentary disposition it may impose thereon any burdens, including therein taxes, and impose them in any manner it chooses. * * * Illinois had regulated the matter of descents and distributions and had granted the right of testamentary disposition. And now by this statute upon property passing in accordance with its statutes a tax is imposed; a tax * * * unequal because based upon a classification purely arbitrary, to-wit, that of wealth—a tax directly and intentionally made unequal."¹³

In the case of *Knowlton v. Moore*,¹⁴ the Supreme Court of the United States also sustained the validity of a Federal Inheritance Tax which made the rate of tax depend upon the character of the links connecting those taking with the deceased, being primarily determined by the classifications, and progressively increased according to the amount of the legacies or shares. It held that in such cases "death is the generating source from which the particular taxing power takes its being and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested," and that though the state can and does regulate such matters, and can itself tax the right, the Federal Government can tax also. It, however, strenuously denied that it was

¹³ Though the point was evidently not insisted upon by counsel, that it was clearly involved and at the basis of the whole decision seems to have been recognized by Mr. Justice McKenna when in the majority opinion, he said:

"The constitutionality of the taxes have been declared and the principles upon which they are based explained in *United States v. Perkins*, 163 U. S. 625, 628; *Strode v. Commonwealth*, 52 Penn. St. 181; *Eyre v. Jacob*, 14 Gratt. 422; *Schoolfield v. Lynchburg*, 78 Va. 366; *State v. Dalrymple*, 70 Maryland 294; *Clapp v. Mason*, 94 U. S. 589; *In re Merriam's Estate*, 141 N. Y. 479; *State v. Hamlin*, 86 Maine 495; *State v. Alston*, 94 Tenn. 674; *In re Wilmerding*, 117 Cal. 281; *DOS PASSOS COLLATERAL INHERITANCE TAX* 20; *Minot v. Winthrop*, 162 Mass. 113; *Gelsthorpe v. Furnell* (Mont.) 51 Pac. 267. See also *Scholey v. Rew*, 23 Wall. 331.

"It is not necessary to review these cases or state at length the reasoning by which they are supported. They are based on two principles: 1. An inheritance tax is not one on property, but one on the succession. 2. The right to take property by devise or descent is the creature of the law, and not a natural right—a privilege, and therefore the authority which confers it may impose conditions upon it. From these principles it is deduced that the states may tax the privilege, discriminate between relatives, and between these and strangers, and grant exemptions; and are not precluded from this power by the provisions of the respective state constitutions requiring uniformity and equality of taxation.

"The second principle was given prominence in the argument at bar. The appellee claimed that the power of the state could be exerted to the extent of making the state the heir to everybody, and the appellant asserted a natural right of children to inherit. Of the former proposition we are not required to express an opinion. Nor indeed of the latter, for appellant conceded that testamentary disposition and inheritance were subject to regulation."

¹⁴ 178 U. S. 41.

taxing or could tax the right of the state to regulate the matter of inheritance or succession, but merely the right to receive after such regulation. It then significantly said:

"Certainly a tax placed upon an inheritance or legacy diminishes to the extent of the tax the value of the right to inherit or receive, but this is a burden cast upon the recipient and not upon the power of the state to regulate. This distinction shows the inapplicability to the case in hand of the statement made by Mr. Chief Justice Marshall in *McCulloch v. Maryland*, 4 Wheat., 316, 431, 'that the power to tax involves the power to destroy.' This principle is pertinent only when there is no power to tax a particular subject, and has no relation to a case where such right exists. In other words, the power to destroy which may be the consequence of taxation is a reason why the right to tax should be confined to subjects which may be lawfully embraced therein, even although it happens that in some particular instance no great harm may be caused by the exercise of the taxing authority as to a subject which is beyond its scope. But this reasoning has no application to a lawful tax, for if it had there would be an end of all taxation; that is to say, if a lawful tax can be defeated because the power which is manifested by its imposition may when further exercised be destructive, it would follow that every lawful tax would become unlawful, and therefore no taxation whatever could be levied. Under our constitutional system both the national and state governments, moving in their respective orbits, have a common authority to tax many and diverse objects, but this does not cause the exercise of its lawful attributes by one to be a curtailment of the powers of government of the other, for if it did there would practically be an end of the dual system of government which the Constitution established."

This opinion is important and significant, for not only does it recognize a concurrent right in both the state and Federal governments to impose inheritance taxes, and repudiates the theory that the right to inherit is a natural and inalienable right, but it also repudiates the reasoning of the Supreme Court of Wisconsin, which is perhaps the only court in the country which holds clearly to that contention. In the case of *Nunnemacher v. State of Wisconsin*,¹⁵ the Wisconsin court held that the right to inherit and to take by will was a natural and inalienable right, but that, seeing the machinery of the courts of the state had to be used to enjoy it, a reasonable tax or charge could be imposed for the use of that ma-

¹⁵ 129 Wis. 190, 9 L. R. A. (N.S.) 121.

chinery. It is perfectly clear that the Federal government could not tax for the use of that machinery, and it is also perfectly clear that if the right was a right conferred by the state alone the Federal government could not tax or charge for that right, or even the right to receive or take, for the privilege was one which the state and not the Federal government created.

Again, in the case of *Campbell v. California*,¹⁶ the same court said: "The contention is that the assailed law of California was repugnant to the Fourteenth Amendment, because it subjected to the burdens of an inheritance tax or charge brothers and sisters of a decedent, and did not subject to any burden such strangers to the blood as the wife or widow of a son or the husband of a daughter of a decedent. We do not stop to refer in detail to the many forms of argument by which the contention is sought to be sustained, but content ourselves with stating that, whatever be the form in which the propositions relied on are advanced, they all reduce themselves to and must depend upon the soundness of the contention that the Fourteenth Amendment compels the states, in levying inheritance taxes, and, *a fortiori*, in regulating inheritances, to conform to blood relationship. That is to say, in their last analysis all the arguments depend upon the proposition that the Fourteenth Amendment has taken away from the states their power to regulate the passage of property by death or the burden which may be imposed resulting therefrom, because that amendment confines the states absolutely, both as to the passage of such property and as to the burdens imposed thereon, to the rule of blood relationship. To state the proposition is to answer it. Its unsoundness is demonstrated by previous decisions of this court. *Magoun v. Illinois Trust and Savings Bank*, 170 U. S., 283; *Orient Insurance Company v. Daggs*, 172 U. S., 577, 562. It is true that in the first of the cases it was expressly declared or impliedly recognized that in the exercise by a state of its undoubted power to regulate the burdens which might be imposed on the passage of property by death, a case might be conceived of where a burden would be so arbitrary as to amount to a denial of the equal protection of the laws. But this suggestion did not imply that the effect of the Fourteenth Amendment was to control the states in the exercise of their plenary authority to regulate inheritances and to determine the person or objects upon which an inheritance burden might be imposed. In this case there can be no doubt, if the right of a state be conceded to select the person who may inherit or upon whom the burden

¹⁶ 200 U. S. 87, 93.

resulting from an inheritance may be imposed, the complaint against the statute is entirely without merit. The whole case, therefore, must rest upon the assumption that because the state of California has not followed the blood rule of relationship, but as to particular classes has applied the rule of affinity by marriage, therefore the constitutional provision guaranteeing the equal protection of the law was violated. But, unless the effect of the Fourteenth Amendment was inexorably to limit the states in enacting inheritance laws to the rule of blood relationship, such a regulation plainly involved the exercise of legislative discretion and judgment, with which the Fourteenth Amendment did not interfere. Such a regulation cannot in reason be said to be an exercise of merely arbitrary power. * * * With the motives of public policy which may induce a state to prefer near relatives by affinity to collateral relatives, we are not concerned, since the Fourteenth Amendment does not deprive a state of the power to regulate and burden the right to inherit, but at the most can only be held to restrain such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority."

This is a strange opinion and a strange conclusion. It repudiates the theory of a natural and inalienable right, but, though it recognizes no right in anyone, possibly imposes upon the states the duty of exercising judgment and discretion in a matter in which it concedes that no party has the right to call them to account and in which they may have plenary power.

It is clear indeed that in these decisions there is no recognition of any natural or inalienable right to inherit, and it is equally clear that if any such right exists it is of no value since it can be taxed out of existence or regulated at will, save possibly or "at the most" by "such an exercise of power as would exclude the conception of judgment and discretion, and which would be so obviously arbitrary and unreasonable as to be beyond the pale of governmental authority." But what are the limits of that pale? Since the power to tax can be used as a power to destroy, and the motives of the legislature cannot be inquired into, and no one has any vested right of property so that he can object, what succor is there?

Is it not necessary that we should get upon some firm and reasonable foundation and that we should cease performing intellectual gymnastics?

We are compelled to admit that, historically speaking, there can hardly be said to be any natural or inalienable right to inherit

or to take by will. According to Blackstone,¹⁷ and we believe according to the facts of history, the right to take personal property by descent long antedated the right to take by will, but that even it did not originate in any recognition of natural rights, but merely from the fact that the blood relatives were generally members of the household at the time of the death and did or were presumed to take possession of the property of the deceased whose rights died with him. The property was in the nature of treasure trove. It is true that custom ripened into a more or less positive law, but even with this custom feudalism played havoc, and it would be hard to prove, at any rate after the Norman conquest, and even for a long time prior thereto, that any inalienable right existed, but rather that it was society and not nature that created the privilege. "Wills therefore and testaments, rights of inheritance and successions," says William Blackstone,¹⁸ "are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them: every distinct county having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments. In England particularly this diversity is carried to such a length, as if it had been meant to point out the power of the laws in regulating the succession to property, and how futile every claim must be that has not its foundation in the positive rules of the state. In personal estates the father may succeed to his children; in landed property he can never be their immediate heir, by any of the remotest possibility; in general, only the oldest son, in some places only the youngest, in others all the sons together, have a right to succeed to the inheritance; in real estate males are preferred to females, and the eldest male will usually exclude the rest; in the division of personal estates the females of equal degree are admitted together with the males, and no right of primogeniture is allowed."

"This one consideration may help to remove the scruples of many well-meaning persons who set up a mistaken conscience in opposition to the rules of law. If a man disinherits his son by a will duly executed, and leaves his estate to a stranger, there are many who consider this proceeding as contrary to natural justice; while others so scrupulously adhere to the supposed intention of the dead that if a will of lands be attested by only two witnesses instead of three which the law requires, they are apt to imagine

¹⁷ 2 BLACK. COMM. 11, 12.

¹⁸ 2 BLACK. COMM. 12.

that the heir is bound in conscience to relinquish his title to the devisee. But both of them certainly proceed upon very erroneous principles, as if on the one hand the son had by nature the right to succeed to his father's lands; or as if on the other hand the owner was by nature entitled to direct the succession of his property after his own decease. Whereas the law of nature suggests that on the death of the possessor the estate should again become common, and be open to the next occupant, unless otherwise ordered for the sake of civil peace by the positive law of society."

No one, we believe, can deny that the very enactment of the statutes of wills and the granting by Parliament of the right to devise and bequeath was in itself a denial of the existence of inalienable property rights in the heirs and family of the deceased.

And no one, of course, can maintain that the right to dispose by will, at any rate after the advent of feudalism, was ever considered in England to be a natural and inalienable right. It is true that wills are of ancient origin, that some are found in Egypt which antedate the Ptolemies, and that in the Codes of Hammurabi, which were written more than twenty-two hundred years before the birth of Christ, we find statutes of descent which are not unlike those to be found in the American States of the present day."¹⁹ "It is obvious, from instances named in Holy Scripture, that the practice of making testaments existed among the Hebrews in the days of the patriarchs. The right of testamentary disposition of property was introduced in Athens by the laws of Solon. It existed among the Romans in three different forms, before the date of the Twelve Tables. And traces of its existence are found among the Germans and other continental nations of Europe at a very early day, and among the very earliest vestiges of judicial history in the island of Great Britain."²⁰ But it is doubtful whether this privilege extended at any time to real property, and it is certain that if it did, both as regards real and personal property, it had no recognition under the feudal system, for feudalism enforced a rule of obligation rather than recognized natural rights and a chain of title which ended in the feudal lord. It is clear indeed that "before the Statute of Wills in England the right of testamentary disposition of property in the subjects of the crown did not extend to real estate; and as to personal estate it was limited unless the testator had neither wife nor children." It is also clear that "At common law, prior to the statute

¹⁹ BRUCE, *PROPERTY AND SOCIETY*, 115.

²⁰ REDFIELD ON WILLS [4th Ed.] 3; Gen. Chap. 15; Gen. Chap. 48; PLUTARCH'S *LIFE OF SOLON*; 4 KENT'S *COMM.*, 503; Chitty's Note to 2 BLACK. *COMM.* 491.

of distribution in England (22 and 23 Car. 11), descent of personal property could hardly be recognized."²¹

But is it necessary to go to the length of the Supreme Court of Maine, when, in the case of *State v. Hamlin*,²² it said: "The constitution guarantees to the citizen the right of acquiring, possessing and protecting property. Article 1, Sec. 1, which includes all the right of disposal. But the guaranty ceases to operate at the death of the possessor. There is no provision of our constitution, or that of the United States, which secures the right to any one to control or dispose of his property after his death, or the right to any one, whether kindred or not, to take by inheritance."

Can we not rely to some extent on the fact that Magna Charta provided that in case of a feeholder, after the debts to the crown were paid "The rest [of the personal property] shall be left to the executors to fulfill the testament of the dead * * *" And that if there was nothing due to the crown, "all the chattels shall go to the use of the dead, saving to his wife and children their reasonable shares." And that "If any freeman shall die intestate, his chattels shall be distributed by the hands of the nearest relations and friends, by view of the church; saving to everyone his debts which the deceased owned to him."

Can we not rely on the fact that at the time of the adoption of the Federal and of all of the state constitutions "The right to transmit property by descent to one's own offspring" was considered to be "dictated by the voice of nature" and that "the universality of the sense of a rule of obligation" was considered to be "pretty good evidence that it" had "its foundation in natural laws"?²³ Can we not rely upon the fact that at those periods of time "in America the right to acquire, to hold, to enjoy, to alien, to devise and to transmit property by inheritance to our descendants in regular order and succession" was "enjoyed to the fulness and perfection of absolute right"?²⁴

The courts have time and again held that the right to liberty and to property does not alone involve the material physical thing, but the right to labor and to acquire it and to make contracts that will lead to its acquisition.²⁵ Is it an unjustifiable assumption that when we spoke of life, liberty, and property, and forbade their

²¹ 32 and 34 Henry VIII: REDFIELD ON WILLS [4th Ed.] 3; 2 BLACK. COMM. 492; *United States v. Perkins*, 163 U. S. 625, 627; *Mager v. Grima*, 8 How. 490, 493.

²² 86 Maine 495, 505.

²³ 2 KENT. COMM. 326.

²⁴ 2 KENT. COMM. 327.

²⁵ *Ritchie v. People*, 155 Ill. 98; PROPERTY AND SOCIETY I.

deprivation without due process of law, we included in our ideas of property not only the right to contract and to hold and acquire while living but reasonably to dispose of it after death?

Cannot we say that the right to devise and to bequeath, though not a natural, is, in America at any rate, a constitutional right,²⁶ and that, though there can perhaps, generally speaking, be no fixed limits to the taxing power, such power was granted and conceded for the legitimate purposes of government alone, and after a revolution the principal cause of which was an abuse in the exercise of such power? Can we not place the ban of public disapproval on the use of the taxing power as a means of destruction or as a means to obtain information, to make corporations report, to enable us to search into their affairs, or as a means to avoid the constitutional prohibition against unreasonable searches and seizures?²⁷ Cannot we at least say that, though perhaps these things can be done, their doing is totally opposed to the theory of our government and to the spirit which lies beneath the constitution? Should we not at any rate do directly that which we are seeking to do indirectly? or, if it cannot be constitutionally done directly, not do it at all? Can any one doubt the anarchy and industrial ruin that will prevail if the tendency of today continues?

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²⁶ *Dibrell v. Lanier*, (Tenn.) 12 L. R. A. 70.

²⁷ See reason given by President Taft for the imposition of the corporation tax.